IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 10-22095-CIV-MORENO

ANA MARGARITA MARTINEZ

Plaintiff,

v.

THE REPUBLIC OF CUBA

Defendant,

v.

ABC CHARTERS, INC.
AIRLINE BROKERS COMPANY, INC.
C&T CHARTERS, INC.
CUBA TRAVEL SERVICES, INC.
GULFSTREAM AIR CHARTER, INC.
MARAZUL CHARTERS, INC.
WILSON INTERNATIONAL SERVICES, INC. and
XAEL CHARTERS, INC.

Garnishees,

v.

UNITED STATES OF AMERICA

Intervenor.
_____/

INTERVENOR UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND TO QUASH PLAINTIFF'S WRITS OF GARNISHMENT

INTRODUCTION

At issue in this action is whether the plaintiff may satisfy a default judgment she obtained against the Government of Cuba in 2001 by garnishing payments owed by eight air charter companies to entities in Cuba in connection with flight services authorized by the United States Government. As set forth below, plaintiff has obtained writs of garnishment in violation of federal statutory and regulatory authority, the assets plaintiff has garnished are not available to satisfy her judgment, and the writs threaten significant U.S. foreign policy interests.

The writs of garnishment at issue, which plaintiff obtained from a Florida state court in February 2010, transfer a property interest in the United States in which Cuba or a Cuban national has an interest. Transfers of such interests are regulated by the Cuban Assets Control Regulations (CACR), 31 C.F.R. Part 515. The CACR prohibit any transfer of a Cuban property interest unless licensed by the U.S. Department of Treasury, Office of Foreign Assets Control (OFAC), and "transfer" is defined to include the issuance of a writ of garnishment by a court. *See* 31 C.F.R. §§ 515.201, 515.310. There is no dispute that plaintiff has failed to obtain a license from OFAC authorizing transfer of the assets at issue through the writs of garnishment. *See* Declaration of Adam Szubin, Director of OFAC (Attachment 1 hereto), ¶¶ 3, 13. Accordingly, under the CACR, plaintiff's writs are "null and void." *See* 31 C.F.R. § 515.202(e).

The central issue in this case is whether any statutory authority supersedes the requirements of the CACR and permits attachment of these assets; as set forth below, none does. In particular, the principal statutory provision on which plaintiff has relied—the Terrorism Risk Insurance Act of 2002 (TRIA)—does not apply here because the assets at issue have not been "seized or frozen" by the United States. On the contrary, the United States has specifically authorized the garnishees to provide carrier services to Cuba and to make payments to entities in

Cuba in connection with those services. *See* Szubin Decl. ¶ 12. That is, the Government has expressly *permitted* the assets at issue to flow to Cuba—not seized or frozen them. Courts have recognized that the TRIA does not apply in these circumstances.

In addition to violating the CACR, maintenance of the writs interferes with the foreign policy judgment of the United States that certain flight services to Cuba be permitted. The United States has authorized these services, and accompanying payments to entities in Cuba, in order to serve important foreign policy interests—including to foster democratic change in Cuba by facilitating greater contact between Cuban families and their relatives in the United States. *See* Declaration of Peter Brennan, Department of State, Coordinator for Cuban Affairs (Attachment 2 hereto) ¶¶ 2-6. The writs obtained by plaintiff already have prevented the transfer of some authorized payments (owed around the time the writs were issued) and thus presently interfere with the Government's policy. Unless quashed, the writs threaten to further disrupt the Government's significant interests at stake. As set forth further below, there is no genuine issue of material fact,[1] and the United States is entitled to summary judgment.

BACKGROUND

1. Procedural Background

Plaintiff obtained a default judgment against the Republic of Cuba in March 2001 from the Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida. That judgment was granted pursuant to section 1605(a)(7) of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(7), which created an exception to the sovereign immunity of foreign states in suits where money damages are sought for injury caused by, *inter alia*, acts of torture committed

[1] *See* Intervenor United States' Statement of Material Facts submitted herewith.

by a foreign state that has been designated by the United States as a state sponsor of terrorism. Dkt. No. 1-4 (Final Default Judgment).[2] Plaintiff was awarded $7.2 million in compensatory damages and $20 million in punitive damages based on the state court's determination that she had been subject to torture and sexual battery. *See id*.[3]

In February 2010, plaintiff obtained writs of garnishment from the clerk of the Florida state court that garnish payments owed by eight U.S. air charter companies to entities in Cuba in connection with flight services. *See* Dkt. No. 1-5 (Writs of Garnishment). After an initial effort by the garnishees to remove the case to this Court and a subsequent remand to state court,[4] the United States intervened in the state court proceedings and removed the case again to this Court in order to protect and defend significant federal policy interests. *See* Dkt. 1 (United States Notice of Removal) ¶¶ 4-12. By Order dated November 22, 2010, the Court denied plaintiff's motion to remand the case again to state court. *See* Dkt. 25. The United States now seeks to quash the writs in order to protect its statutory and regulatory authority over the assets at issue and its significant foreign policy interests.

2. Statutory and Regulatory Background

This case involves the intersection of three related sources of statutory and regulatory

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[2] In 2008, Congress repealed section 1605(a)(7) and enacted an amended terrorism exception codified at 28 U.S.C. § 1605A, which is not applicable in this case.

[3] In 2005, the United States made a payment to plaintiff of $198,000 from Cuban government funds vested by the President in partial compensation of her claim for compensatory damages, pursuant to section 2002 of the Victims of Trafficking and Violence Protection Act ("VTVPA") of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541-1543. *See* Declaration of Barbara Hammerle, Office of Foreign Assets Control (Attachment 3 hereto), ¶¶ 13-15. In exchange for this payment, plaintiff agreed to relinquish her right to seek punitive damages. *See id*., Exh. C (thereto).

[4] *See* Docket in 10-CIV-20611-FAM.

authority—the CACR, FSIA, and TRIA— which are summarized below.

A. Cuban Assets Control Regulations

Since 1962, the United States has imposed a comprehensive embargo on virtually all trade with Cuba. *See Regan* v. *Wald*, 468 U.S. 222, 226 & n.4 (1984); *see also DeCuellar v. Brady*, 881 F.2d 1561, 1562-63 (11th Cir. 1989). The current terms of the embargo administered by the Department of the Treasury are reflected in the CACR, *see* 31 C.F.R. Part 515, which were promulgated pursuant to the Trading With the Enemy Act of 1917 (TWEA), codified at 50 U.S.C. App. § 1 *et seq.*, and the Foreign Assistance Act of 1961 (FAA), Pub. L. No. 87-195, codified in part at 22 U.S.C. § 2370. Section 5(b) of the TWEA authorizes the President to regulate and prohibit a wide range of transactions or dealings in any property in which a foreign country or a national thereof has any interest.[5] *See* 50 U.S.C. App. § 5(b)(1)(B); *see DeCuellar*, 881 F.2d at 1562-63. The President delegated his TWEA authority to the Secretary of the Treasury, who in turn delegated that authority to OFAC. *See Regan*, 468 U.S. at 226 n.2; *see also* 31 C.F.R. § 515.802.

Tracking section 5(b) of the TWEA, the CACR prohibit any dealings in, or transfers of, any property, including any evidence of indebtedness, in which Cuba or a Cuban national has an interest by any person subject to the jurisdiction of the United States, unless licensed by the Department of the Treasury. *See* Szubin Decl. ¶ 8; *see also* 31 C.F.R. § 515.201(b)(1). The "transfer" of a property interest is broadly defined in the CACR to include "any actual or purported act or transaction . . . the purpose, intent, or effect of which is to . . . transfer, or alter,

[5] In 1977, Congress amended TWEA to make it applicable only in wartime or with respect to powers then being exercised (such as the CACR). *See* Pub. L. No. 95-223, 91 Stat. 1625, § 101(b); *Regan*, 468 U.S. at 225-228; *DeCuellar*, 881 F.2d at 1562-63.

any right, remedy, power, privilege, or interest with respect to any property . . . ." *Id.* § 515.310. This definition specifically includes the "issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment[.]" *Id*. The CACR also provide that, "[u]nless licensed . . . , any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property" subject to the regulations. *See id*. § 515.203(e).

In addition, pursuant to the CACR, all travel transactions to, from, and within Cuba are transactions in which Cuba or a Cuban national has an interest. *See* Szubin Decl. ¶ 9; *see also generally* 31 C.F.R. §§ 515.311-.312 (defining property, property interests, and interest); § 515.309 (defining transactions); § 515.420 (interpretive provision regarding travel to Cuba and the prohibition in 31 C.F.R. § 515.201(b)(1) on dealing in property in which Cuba or a Cuban national has an interest). Accordingly, Cuba-related travel transactions by persons subject to U.S. jurisdiction are prohibited unless authorized by OFAC. *Id*. §§ 515.201(b)(1), 515.802.

The eight garnishee carrier service providers are licensed by OFAC to provide Cuba travel-related services, incur obligations that arise in connection with such services, and make payments to Cuba to satisfy those obligations, such as payments for landing fees. Szubin Decl. ¶ 12. OFAC requires that all U.S. "travel service providers" and "carrier service providers" obtain authorization from OFAC before they provide Cuba-related travel services. Szubin Decl. ¶ 11; *see also* 31 C.F.R. § 515.572(a)(1)-(2). In particular, travel service providers and carrier service providers must comply with specific documentation and reporting requirements to maintain their licenses. *Id*. § 515.572. *See generally* OFAC Circular 2006, Travel, Carrier and

Remittance Forwarding Service Provider Program & Addendum (2006).[6]

The CACR travel restrictions have been revised since the inception of the embargo. *See generally Regan*, 468 U.S. at 225–30. The CACR currently permit travel to Cuba in certain instances that serve U.S. interests, including travel transactions by individuals with family in Cuba, journalists, researchers, U.S. Government officials,[7] and certain other persons.[8] *See* 31 C.F.R. §§ 515.560-.567; *see also* Brennan Decl. ¶¶ 5. Most recently, on April 13, 2009, President Obama announced a policy of permitting unrestricted family visits to close relatives who are nationals of Cuba. *See* Brennan Decl. ¶ 4 and Exhibit 1 (Memorandum from the President to the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce (April 13, 2009)). Pursuant to this policy, OFAC removed limitations on the frequency and duration of family visits and expanded the definition of family members who can be visited. *See id*., citing 74 Fed. Reg. 46000-46007 (Sep. 8, 2009); 31 C.F.R. § 515.561. The foreign policy of the United States is to support the desire of the Cuban people to freely determine their future, including by assisting the free flow of information to, from, and within Cuba. *See* Brennan Decl. ¶ 2. Among the policy goals behind the flight authorization is to facilitate greater contact

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[6] *See* www.treas.gov/ofac (links to OFAC publications); *see also* http://www.treasury.gov /resource-center/sanctions/Programs/Documents/circ2006 and http://www.treasury.gov/resource-center/sanctions/Programs/Documents/circ2006_add.pdf.

[7] Travel by U.S. government employees is vital for operating the U.S. Interests Section in Havana, which maintains a large consular caseload and a channel for communications with the Cuban government, allows the federal government to monitor the situation in Cuba, and performs a range of other functions typical for U.S. missions abroad. *See* Brennan Decl. ¶ 5.

[8] The United States also licenses travel to Cuba related to humanitarian projects, to support civil society and human rights organizations in Cuba, to conduct religious activities, for public performances and athletic competitions, for educational purposes, and for the negotiation, marketing or sale of licensed U.S. exports. *See* Brennan Decl. ¶ 5.

between separated family members in the United States and Cuba in order to encourage positive change in Cuba by decreasing the Cuban people's dependency on the Cuban government, promoting democratic values, and increasing Cubans' access to information. *Id.* ¶ 4. All direct travel between the United States and Cuba takes place through the air charter service provided by the eight garnishees in this action, *see id.* ¶ 6, and a disruption in licensed air charter service would cause serious harm to U.S. foreign policy toward Cuba. *Id.* ¶ 6.

B. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act, under which plaintiff obtained her default judgment, provides the exclusive basis for civil actions brought against foreign states in federal and state courts in the United States. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989); *Alejandre v. Republic of Cuba*, 183 F. 3d 1277, 1282 (11th Cir. 1999); *Weininger v. Castro*, 462 F. Supp. 2d 457, 477 (S.D.N.Y. 2006). The FSIA provides that a foreign state is presumptively immune from suit unless an exception to the state's sovereign immunity set forth in sections 1605-1607 of the Act applies in the case. *See* 28 U.S.C. § 1330(a); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983). Plaintiff's judgment was obtained under then-section 1605(a)(7) of the FSIA, *see* Dkt. No. 1-4 (Final Default Judgment) at 21-24, which at the time created an exception to sovereign immunity for suits against foreign states designated as state sponsors of terrorism. *See* note 1 *supra* (noting repeal and replacement of section 1605(a)(7)). Specifically, section 1605(a)(7) permitted suits by U.S. citizens "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking" committed by an official, employee, or agent of a foreign state designated as a state sponsor of terrorism by the Department of State at the time the

act occurred or as a result of the act that caused the injury or death. *Id*. § 1605(a)(7)(A). 28 U.S.C. § 1605(a)(7); *see also Alejandre*, 183 F.3d at 1283.[9]

The FSIA also prescribes the circumstances under which attachment and execution may be obtained against the property of a foreign state to satisfy a judgment (including a judgment relating to a claim for which the foreign state is not immune under the prior section 1605(a)(7)). The FSIA again establishes a presumption that the property of a foreign state in the United States "shall be immune from attachment arrest and execution," 28 U.S.C. § 1609, except as provided in 28 U.S.C. §§ 1610 and 1611.[10] *Id.* Section 1610 provides enumerated exceptions to that immunity, including as to the property of foreign states "used for commercial activity in the United States," 28 U.S.C. §1610(a), and as to the property of an agency or instrumentality of a foreign state that is "engaged in commercial activity in the United States." *See id*. §1610(b).

Section 1610(f)(1)(A) of the FSIA further addresses the execution of a judgment obtained under section 1605(a)(7), and provides in pertinent part that, "[n]otwithstanding any other provision of law . . . any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. [§] 5(b)) . . . or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment related to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section

[9] In 1982, Cuba was designated by the Department of State as a state sponsor of terrorism, pursuant to the Export Administration Act, 50 U.S.C. App. § 2405(j).

[10] Section 1611 identifies certain types of property that are immune from attachment, regardless of whether an exception in § 1610 is satisfied. *See* 28 U.S.C. § 1611.

1605A) or section 1605A." 28 U.S.C. §1610(f)(1)(A). Section 1610(f)(3) provides that the President may waive any provision of section 1610(f)(1)(A) in the interest of national security, *see* §1610(f)(3), and the President has previously exercised this waiver authority.[11]

C. Terrorism Risk Insurance Act

In addition to the FSIA, the Terrorism Risk Insurance Act, a freestanding statute enacted by Congress in 2002, further addresses the circumstances under which a person holding a judgment obtained under section 1605(a)(7) of the FSIA may attach certain assets of foreign states that are terrorist parties. *See* P.L. No. 107-297, 116 Stat. 2322 (reprinted after 28 U.S.C. § 1610 Historical and Statutory Notes). As relevant here and discussed below, for judgments obtained under FSIA section 1605(a)(7), the TRIA authorizes the attachment of assets that have been "seized or frozen" pursuant to the TWEA, but excludes from attachment property that is subject to a license for final payment in connection with a transaction for which a license is specifically required by the TWEA.[12]

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[11] *See* Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (October 21, 1998); Presidential Determination 2001-03, 65 Fed. Reg. 66,483 (November 6, 2000).

[12] Section 201 of the TRIA provides in pertinent part: "Notwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. §1605(a)(7)], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable." *See* P.L. No. 107-297, § 201(a) (reprinted after 28 U.S.C. § 1610 Historical/Statutory Notes). TRIA defines the term "blocked assets" of a terrorist party in pertinent part as follows:

> (A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

D. Determination by the Office of Foreign Assets Control

In response to the issuance of the writs of garnishment to plaintiff by the Florida state court, OFAC Director Adam Szubin—the federal official responsible for the administration of the CACR—has set forth several determinations applicable to this case. First, Director Szubin has determined that the assets plaintiff seeks to garnish are regulated by the CACR. Szubin Decl. ¶¶ 3, 13. Second, Director Szubin confirmed that plaintiff has not applied for nor obtained a license from OFAC to garnish the assets at issue. *Id*. Third, Director Szubin has determined that the assets subject to the writs do not fall within the TRIA definition of "blocked asset" subject to attachment under that statute. *See* Szubin Decl. ¶ 14. On the contrary, the writs seek to transfer to plaintiff certain assets that OFAC has authorized previously for transfer to Cuban entities as payment for flight services the United States has authorized. *Id.* More specifically, OFAC has licensed from their inception the garnishees' indebtedness and payments to Cuban entities that plaintiff seeks to garnish. *Id*. The payments came into existence only after OFAC authorized both the provision of services by the carriers and the transfer of payments to entities in Cuba. *Id*. ¶ 12. In addition, OFAC does not restrict the carriers' ability to contract with and pay entities in Cuba any amount, at any time, for services related to their travel operations. *Id*. For these reasons, while the provision of travel services to Cuba and associated payments are

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> (B) Does not include property that (i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.) ("UNPA") . . . .

Id. § 201(d)(2)(A), (B)(i).

regulated under the CACR, OFAC Director Szubin has determined that the assets plaintiff has subjected to writs of garnishment are not "seized or frozen" and therefore are not "blocked assets" within the meaning of the TRIA. *Id*. ¶ 14.

ARGUMENT

Summary judgment is authorized where there is no genuine issue of material fact. *See* Fed.R.Civ.P. 56(c). *Ugaz v. American Airlines, Inc*., 576 F. Supp. 2d 1354, 1359 (S. D. Fla. 2008) (Moreno, C.J.). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Id.* (citing *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 157 (1970)). The party opposing the motion for summary judgment may not simply rest upon mere allegations or denials in the pleadings; the non-moving party must establish the essential elements of its case on which it will bear the burden of proof at trial. *Id*. (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986)). The party opposing the motion must also present more than a scintilla of evidence in support of its position. *Id*. (citing Fed.R.Civ.P. 56(c) and *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252 (1986)). "'The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment.'" *Id*. (quoting *Henderson v. Carnival Corp*., 125 F. Supp. 2d 1375, 1376 (S.D.Fla.2000)).

No genuine issue of material fact precludes the Court from granting summary judgment for the United States. *See* U.S. Statement of Material Facts. In sum, plaintiff seeks to garnish assets in which Cuba or a Cuban national has an interest—indeed, the very purpose of garnishing these assets is to satisfy a judgment against Cuba. Any transfer of these assets is subject to the

requirements of the CACR. The CACR, issued under the authority of the TWEA, forecloses the "transfer" of such interests absent a license issued by OFAC, *see id*. §§ 515.201(b)(1), 515.311, and "transfer" is defined to include the issuance of a writ of garnishment, *see id*. § 515.310 and 515.203(e). There is no dispute that plaintiff has not obtained a license for the issuance of the writs at issue. *See* Szubin Decl. ¶ 13. Under these circumstances, the writs are presumptively null and void, *see id*. § 515.203(e), unless otherwise authorized by another source of law.

Two sources of statutory authority could potentially authorize attachment of the payments to Cuba in dispute: the FSIA and/or the TRIA. As set forth below, neither statute applies to authorize garnishment here. The OFAC Director's determination that the writs impermissibly transfer a property interest in contravention of CACR licensing requirements, and are not otherwise authorized by law, is well-supported, clearly correct, and entitled to deference.

I. THE PAYMENTS PLAINTIFF SEEKS TO GARNISH ARE IMMUNE FROM ATTACHMENT AND EXECUTION UNDER THE FSIA.

As outlined above, the FSIA creates a presumption that the property of a foreign state is immune from attachment and execution unless there is a judicial determination that one of the statute's enumerated exceptions to immunity is satisfied. *See* 28 U.S.C. § 1609 (providing that the property of a foreign state in the United States "shall be immune from attachment arrest and execution," unless a court determines that one of the exceptions to immunity provided in 28 U.S.C. §§ 1610 and 1611 is met); *see also Weininger*, 462 F. Supp. 2d at 478.[13]

[13] 28 U.S.C. § 1610(c) sets forth the requirement that only a court—not a clerk of a court—may issue an order to execute upon the assets of a foreign state or instrumentality pursuant to section 1610. *See Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002). Plaintiff's failure to obtain the writs from a judge constitutes a separate ground on which the writs may be quashed, but this defect cannot be cured in any event because the assets at issue are not subject to attachment under the FSIA or TRIA.

The FSIA sets forth several exceptions to the immunity from execution on the property of foreign states, and plaintiff has previously relied on one such exception—section 1610(f)(1)(A)[14]—which authorizes "execution or attachment in aid of execution" of a judgment awarded under section 1605(a)(7) of the FSIA against any property of a foreign state "with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act. . . ." 28 U.S.C. § 1610(f)(1)(A). As noted above, however, this provision has been waived under statutory authority granted to the President with respect to judgments that arose under 28 U.S.C. §1605(a)(7). *See* 28 U.S.C. § 1610(f)(3); *see also* Presidential Determination No. 99-1, 63 Fed. Reg. 59201 (Oct. 21, 1998); Presidential Determination 2001-03, 65 Fed. Reg. 66483 (Oct. 28, 2000). Other exceptions to the immunity of a foreign state's property from attachment or execution under the FSIA do not apply in this case.[15] As a result, the FSIA provides no basis for the issuance of the writs at issue and, thus, their validity in this case turns on whether the TRIA authorizes attachment. As set forth next, the TRIA also does not apply here.

II. THE PAYMENTS PLAINTIFF SEEKS TO GARNISH ARE IMMUNE FROM ATTACHMENT AND EXECUTION UNDER THE TRIA.

Section 201 of the TRIA provides that a person, such as plaintiff, who holds judgment against a state sponsor of terrorism under section 1605(a)(7) of the FSIA may attach the "blocked assets" of that party. *See* TRIA § 201(a) (note 11 *supra*). The term "blocked asset" is

[14] *See* Plaintiff's Response and Memorandum in Opposition to Garnishees' Joint Motion to Dissolve and Dismiss Post-judgment Writs of Garnishment with Prejudice (Dkt. 32 in 10-civ-20611-FAM) at 12.

[15] *See* 28 U.S.C. § 1610(a), (b) (described in text *supra*). Even if one of the exceptions in section 1610 were applicable, a license from OFAC would still be required to attach assets subject to the CACR.

defined in TRIA to (A) include assets that have been "seized or frozen" pursuant to the TWEA, but (B) exclude property that is subject to a license for final payment in connection with a transaction for which a license is specifically required by (*inter alia*) the TWEA. *See id.* § 201(d)(2)(A), (B)(i). The garnishee's indebtedness or payments to entities in Cuba are not subject to attachment under TRIA because they have not been "seized or frozen" by the United States.[16]

The Office of Foreign Assets Control has defined the term "freezing" as a "form of controlling assets under U.S. jurisdiction" that "immediately imposes an across-the-board prohibition against transfers or transactions of any kind with regard to the property." U.S. Treasury Dep't., *Foreign Assets Control Regulations for the Financial Community*, at 4 (Dec. 27, 2002). *See* http://www.treasury.gov/resources-center/sanctions/ Documents/facbk.pdf.[17] Applying that definition to the facts here, OFAC has determined that the assets plaintiff seeks to

[16] The Government's focuses in this memorandum on part A of the TRIA definition of blocked assets ("seized or frozen"). The assets plaintiff seeks to garnish are expressly excluded from attachment under TRIA for the related reason that part B of the definition of "blocked assets" excludes from attachment property that "is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by" TWEA. *See* TRIA, § 201(d)(2)(B)(i). OFAC has specifically authorized the payments at issue pursuant to its authority under the TWEA, and this transfer could not otherwise proceed absent an OFAC license. *See Dean Witter Reynolds v. Fernandez*, 741 F.2d 355, 357 (11th Cir. 1984) ("The [CACR], in connection with § 5(b) of the TWEA, make it unlawful to effect any of the described transactions unless a license authorizing the transaction has been issued by" [OFAC]).

[17] Congress granted the President broad statutory authority (delegated to OFAC) to carry out the TWEA "under such rules and regulations as he may prescribe" and "by means of instructions, licenses, or otherwise." *See id*. § 5(b)(1). Section 201 of the TRIA applies to assets that are "seized or frozen" under (*inter alia*) the TWEA, and, thus, OFAC's regulatory definition is applicable here.

garnish do not fall within the TRIA because they have not been seized or frozen. To the contrary, the assets at issue came into being because the United States determined that certain travel-related services may be provided by the charter entities, and any related obligations due Cuba may be paid. *See generally* Szubin Declaration. That is, the assets exist because OFAC, in consultation with the Department of State, authorized flight services and associated payments by the garnishees. *See* Szubin Decl. ¶ 12. Thus, far from being subject to an across-the-board prohibition on transfer, these assets at issue were authorized to be transferred to Cuba at the outset. Indeed, OFAC does not restrict the carriers' ability to contract with and pay entities in Cuba any amount, at any time, for services related to their travel operations, and the charters are free to end their business with Cuba. *See id*. By virtue of OFAC's authorization to transfer the assets at issue, they are not seized or frozen for purposes of the TRIA. *Id*. ¶ 14.

Courts that have considered the meaning of the term "blocked asset" in TRIA have consistently found that this provision does not apply to assets that may be transferred pursuant to OFAC's authority. The seminal case in this area is *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63 (S.D.N.Y. 2004); *see also Bank of New York v. Rubin*, 484 F.3d 149, 150 (2nd Cir. 2007) (Second Circuit adopts the "persuasive analysis" in *Weinstein* as to definition of "blocked assets" under TRIA). In *Weinstein*, the court addressed whether bank accounts in New York held by Iranian Government banks, which plaintiffs there sought to attach in satisfaction of a section 1605(a)(7) judgment, were "blocked assets" under TRIA. In analyzing that question, the court noted that the terms "block," "seize," and "freeze" are not defined further in the TRIA, and relied upon OFAC's definition of an "across-the-board prohibition against transfers or transactions of any kind with regard to property." *See* 299 F. Supp. 2d at 75. The court also

cited the definition of the word "seize" as meaning to "forcibly take possession of property." *Id.* (citing Black's Law Dictionary 1363 (7th ed. 1999)). The court further observed that, in construing TRIA, the Second Circuit stated that "to seize or freeze assets transfers *possessory* interest in the property." *Id.* (citing *Smith v. Federal Reserve Bank of New York*, 346 F.3d at 272) (original emphasis).

In addition, the court in *Weinstein* recognized that not every aspect of an economic sanctions regime involves the seizing or freezing of assets, but may entail a grant of authority to regulate transfers in property interests. *See Weinstein*, 299 F. Supp. 2d at 75 (pertaining to similar broad Presidential powers under IEEPA to impose economic sanctions). The TWEA, for example, authorizes the President to do more than seize or freeze assets, and includes the authority to regulate any transfer, transactions, or dealings in the property interests of a foreign country. *See* 50 U.S.C. App. § 5(b)(1)(B).[18] Based on a similar broad grant of authority in the IEEPA, the court in *Weinstein* reasoned:

> Given that not every type of action authorized by the IEEPA necessarily involves a seizing or freezing of property, it follows that not every action regarding property under the authority of the IEEPA, including assets that may be "regulated" or "licensed," results in the property being "blocked" under the TRIA.

Id. at 75. The court thus rejected the contention that the term "blocked assets" under the TRIA is an "omnibus term encompassing all Iranian assets which have been blocked, frozen, seized,

[18] The TWEA specifically authorizes the President to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition[,] holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States[.]" 50 U.S.C. App. § 5(b)(1)(B).

restricted *or otherwise regulated* by any proclamation, order, regulation or license issued pursuant to IEEPA." *Id*. (emphasis added).

The court in *Weinstein* also observed that Congress is well aware of the distinction between "blocked assets" that are "seized or frozen" and other types of property interests regulated by OFAC, and chose not to define the universe of property interests attachable under TRIA as coextensive with the universe of property interests subject to sanctions administered by OFAC. *See id.* For example, in section 1610(f)(1)(A) of the FSIA, Congress made eligible for attachment "any property with respect to which financial transactions are *prohibited or regulated* pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)) . . . ." (emphasis added). But the *Weinstein* court observed that Congress "specifically limited" TRIA "to assets that are 'seized or frozen'—a limitation that this Court cannot ignore." *Weinstein*, 299 F. Supp. 2d at 74, 75. Thus, while TRIA was intended to address the impact of the President's waiver of section 1610(f)(1)(A),[19] Congress chose not to subject to attachment under TRIA a broader category of property interests subject to regulation under the TWEA.[20]

The court in *Weinstein* found that the Iranian bank accounts that plaintiffs sought to attach in that case were not "seized or frozen" for purposes of TRIA because the Government had authorized transactions in property that entered the United States after a date certain [January 19, 1981]. *See* 299 F. Supp. 2d at 67-68 (citing 31 C.F.R. § 535.579 (general license)

[19] *See* H.R. Conf. Rep. No. 107-779, at 27, U.S. Code Cong. & Admin. News 2002, pp. 1430, 1434.

[20] Similarly, for judgments against foreign states obtained under the new FSIA terrorism exception in section 1605A, Congress permitted attachment on the property of a foreign state, or agency or instrumentality thereof, that is "regulated by the United States" by reason of an action taken against that foreign state under the TWEA or IEEPA. *See* 28 U.S.C. § 1610(g)(1), (2). TRIA does not extend to such assets.

and § 535.502(c) (license removes effect of blocking prohibition); *see also id*. at 70, 71, 74-75. In addition, under a subsequent sanctions program targeting Iran, OFAC had licensed certain Iranian banks to hold accounts in the United States; Iranian account holders, including the banks, were authorized to close their accounts and transfer the funds to themselves. *See id*. at 70-71 and 31 C.F.R. § 560.517(a)(3)). *Weinstein* firmly supports the conclusion that where, as here, the Government authorizes the provision of services and related fund transfers to a country subject to sanctions, those assets are not "seized or frozen" for purposes of attachment under TRIA.[21]

Judge Jordan of this district recently applied the *Weinstein* decision in circumstances similar to this case. *See Hausler v. Republic of Cuba v. Telecom New Zealand USA (Garnishee*) (Case No. 09-21175-CIV-JORDAN). That case concerns an effort to garnish payments by telecommunication companies related to the routing of telephone calls to Cuba in order to satisfy a judgment obtained under section 1605(a)(7) of the FSIA against the Republic of Cuba. In an order on summary judgment, Judge Jordan held that obligations arising out of calls that terminate in Cuba are not "blocked assets" subject to attachment under the TRIA because they resulted from the provision of services authorized by OFAC license and had not been seized or frozen by the United States. *See id*., Dkt. 62 (October 4, 2010) at 7-10 (Attachment 4 hereto); *see also Hausler v. Republic of Cuba v. Comcast IP Phone II (Garnishee*) (Case No. 09-20942-CIV-JORDAN) (Dkt. 56) (rendering similar summary judgment ruling concerning a separate

[21] *See also Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 129 S.Ct. 1732, 1739 (2009) (holding that proceeds of an arbitral award obtained by the Iranian defense ministry were not "blocked assets" subject to attachment under TRIA because the asset arose after the United States had authorized transactions involving property in which Iran had an interest after January 18, 1981).

garnishee— Comcast IP Phone) (Attachment 4 hereto).[22]

For the foregoing reasons, OFAC's determination that the assets at issue here are not "seized or frozen" within the meaning of TRIA is well supported by law and entitled to deference.[23] Indeed, a contrary interpretation would harm the Government's significant policy interests at stake here. "Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." *Verlinden*, 461 U.S. at 493. The Government's policy with respect to travel to Cuba is an expression of "the United States government's foreign policy goals." *See ABC Charters Inc. v. Bronson*, 591 F. Supp. 2d 1272, 1286 (S.D. Fla. 2008) (Gold, J.). The President has stated that the "promotion of democracy and human rights in Cuba is in the national interest of the United

[22] Plaintiff's motion to reconsider these decisions was pending before Judge Jordan as of the date of this filing. In another decision in the *Hausler* litigation, the U.S. District Court for the Southern District of New York permitted attachment under TRIA on certain electronic fund transfers (EFTs) that were subject to the CACR because the Republic of Cuba or its agencies or instrumentalities were a party to the transfers. *See Hausler v. J.P. Morgan Chase Bank, N.A.*, 2010 WL 3817546 (S.D.N.Y. 2010). There was no dispute in that case that the EFTs were "blocked assets" for purposes of TRIA—indeed, the assets had been placed in a blocked account as required by the CACR starting in 1992. *See id*. at **3,14, 15 n.5. Rather, a different aspect of TRIA was in dispute—whether the assets were "of" a terrorist party, as TRIA requires. The court rejected an argument that TRIA requires that Cuba have ownership of the EFTs under state law. *See id*. **4-8. The issue here is whether the assets being garnished have been "seized or frozen" for purposes of TRIA.

[23] Where Congress has delegated authority to an agency generally to make rules carrying the force of law, a court may not substitute its own construction for a reasonable interpretation made by the administrator of that agency. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *United States v. Mead*, 533 U.S. 218, 226-27 (2001); *see also Buckner v. Fla. Habilitation Network, Inc.*, 489 F.3d 1151, 1154-55 (11th Cir. 2007). As noted, Congress provided broad authority to implement the TWEA "under such rules and regulations as [the President] may prescribe" and "by means of instructions, licenses, or otherwise." 50 U.S.C. § 5(b)(1). TRIA applies to assets that are "seized or frozen" under authority of the TWEA, and OFAC has clear regulatory authority to determine what assets have been seized or frozen under the TWEA.

States and is a key component of this Nation's foreign policy in the Americas," and that measures to "promote contacts between Cuban-Americans and their relatives in Cuba are means to encourage positive change in Cuba." *See* Brennan Decl., Exh. 1 (Presidential Memorandum).

Plaintiff's garnishment action has already interfered with the transfer of certain payments owed by the garnishees around the time the writs were issued—transfers that were authorized by the United States in furtherance of the Government's foreign policy goals. Unless quashed, the writs could lead to the disruption or, ultimately, the cessation of flight services if the garnishees' debt is not paid or if new debt is garnished—seriously damaging the important policy interests the flights are intended to serve. *See* Brennan Decl. ¶ 6; *see also ABC Charters*, 591 F. Supp. 2d at 1296 (the interruption of authorized flights "will further exacerbate the limited visitation rights of Cuban-Americans who have family members remaining on the island."). OFAC's judgment that TRIA does not apply here is plainly reasonable and well-supported. While the CACR regulates travel services to Cuba and associated transactions, TRIA is specifically and narrowly limited to authorizing the attachment of assets that have been seized or frozen—not to assets that exist only because the Government has authorized their transfer to effectuate policy objectives. Indeed, it would thwart the Government's ability to conduct foreign policy if payments resulting from authorized services simultaneously were attachable under TRIA.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court quash the writs obtained by plaintiff in February 2010 and grant summary judgment for the United States.

Date: December 21, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on all counsel of record identified on the attached Service List either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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SERVICE LIST

Martinez v. Republic of Cuba [Defendant] *v. ABC Charters et al.* [Garnishees]
v. United States [Intervenor]

Case Number: 10-22095-CIV-MORENO

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